competing in a physician services market for outpatient cataract surgery, inpatient eye surgery and emergency eye surgery, and prevented MCCSC from competing in a facility services market for outpatient cataract surgery. App. at 40. At the conclusion of a bench trial, the District Court ruled that the petitioners failed to sustain their burden of proving a *prima facie* case under a traditional rule of reason analysis and entered judgment for the Hospital on Count I. The petitioners appealed to the Third Circuit, claiming the District Court should have employed a "quick look" rather than a full rule of reason analysis. The Third Circuit disagreed with the petitioners, holding that the information restraints were "non-price vertical restraints between one hospital and one physician, which we have held is reviewed under the traditional rule of reason." App. at 41. In arriving at that conclusion, the Third Circuit stated that:

> This is especially true given the District Court's determination, with which we agree, that Gordon and the Hospital were not competitors in the relevant market in November 1995 [sic] when he agreed to the Conditions. ***His competition in the facility services market did not commence until MCCSC opened more than one year later.***

App. at 41 (emphasis added; Gordon agreed to the information restraints in 1996, not in 1995; Pet. at 24).

## REASONS FOR GRANTING THE PETITION

FASA, AAO, PAO, ACOS and CMA urge the Court to grant the petition for a writ of *certiorari* to address two aspects of the Third Circuit's decision. First, this case squarely presents the question whether an entity must

actually sell goods or services in the same relevant market to be a competitor under the Sherman Act. The Third Circuit is alone in concluding that potential competitors are not subject and entitled to Sherman Act prohibitions and protections. No other Circuit, including the Third Circuit up until this case, refuses to extend Sherman Act prohibitions and protections to potential competitors. This Court should grant the petition for a writ of *certiorari* to make clear that an entity does not have to sell goods or services in the same relevant market to be a competitor under the Sherman Act. Second, this case raises the question whether a restraint on a physician's ability to disseminate truthful and non-deceptive information about his principal competitor can constitute a substantial effect on competition. This Court should grant the petition for a writ of *certiorari* to make clear that information restraints that limit the ability of physicians to disseminate truthful and non-deceptive information, such as the ones in this case, do have a substantial effect on competition meriting a full consideration by the court and requiring strong procompetitive justifications to sustain the restraints.

## I. THE SHERMAN ACT'S PROHIBITIONS AND PROTECTIONS APPLY TO POTENTIAL COMPETITORS LIKE ASCs.

### A. The Sherman Act applies to both actual and potential competitors.

In *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), the Court found a market allocation agreement between members of a regional supermarket association to be an illegal horizontal restraint even though the association members had never competed in the same market. The

Court clearly found the "restraint in this case [to be] a horizontal one" notwithstanding the fact that the member supermarkets were not actual competitors. *Id.* at 608; *see also Palmer v. BRG of Georgia*, 498 U.S. 46, 49 (1990) (citing *Topco* in support of the proposition that horizontal restraints exist even where parties have "never competed in the same market"); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 378 (1973) (citing *Topco* to re-emphasize "the vice under the Sherman Act of territorial restrictions among potential competitors").

The Third Circuit itself has held that the Sherman Act applies to both actual and potential competitors. In *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1242 (3d Cir. 1975), the Third Circuit, citing *Topco*, found Holiday Inn's practice of allowing existing franchisees effectively to veto a potential competitor's entry into its market to be a horizontal market allocation that violated the Sherman Act. Similarly, in *Evans v. S.S. Kresge Co.*, the Third Circuit explicitly stated that, before horizontal restraints can be declared unlawful, the court must determine whether the agreements imposing such restraints "were made between competitors, actual or potential..." 544 F.2d 1184, 1192 (3d Cir. 1976) (citing *United States v. Columbia Pictures Corp.*, 169 F. Supp. 888, 893 (S.D.N.Y. 1959) but ultimately finding the parties to the suit were neither actual nor potential competitors).

No other Circuit disagrees. In *Engine Specialties v. Bombardier*, 605 F.2d 1, 9 (1st Cir. 1979), the First Circuit sustained a challenge to a horizontal market allocation between Bombardier and Agrati. Bombardier wanted to enter into a manufacturing and distribution agreement with Agrati. Bombardier had developed a competitive minicycle prototype and was prepared to manufacture minicycles. Bombardier told Agrati that if Agrati did not agree to

participate in a manufacturing and distribution agreement with Bombardier, Bombardier would produce its own competitive minicycle. The First Circuit found the two to be "operating at the same horizontal level in the market" and so "competitors" even though Bombardier and Agrati never actually sold goods in competition with each other.

In *In re Terazosin Hydrochloride Antitrust Litigation*, 352 F. Supp. 2d 1279, 1314 (S.D. Fla. 2005), a district court found an agreement between Abbott Laboratories, a brand name drug manufacturer, and Geneva Pharmaceuticals, a generic drug manufacturer, that provided that Geneva would not produce a generic equivalent to Abbott's branded drug until a patent dispute between the two was settled to violate the Sherman Act. When it entered the agreement, Geneva had not yet begun producing a generic version of the drug. The district court stated that "no distinction is made between actual competitors (*i.e.*, those currently competing in the same market) and potential competitors." The court concluded that there was "no question" that the case "present[ed] a 'horizontal agreement.'" *Id.* at 1314 n. 34.

Similarly, in *In re Cardizem CD Antitrust Litigation*, 332 F.3d 896, 899 (6th Cir. 2003), *cert. denied sub nom. Andrx Pharmaceuticals, Inc. v. Kroger Co.*, 534 U.S. 939 (2004), the Sixth Circuit upheld a district court's decision that found illegal an agreement between Hoescht Marion Roussel, Inc. (**HMR**), the manufacturer of a prescription drug, and Andrx Pharmaceuticals, Inc. (**Andrx**). Like the agreement in *Terazosin Hydrochloride*, the *Cardizem* agreement provided that Andrx would refrain from marketing a generic version of the branded drug in exchange for quarterly payments from HMR. The court determined the agreement was an illegal "horizontal market allocation agreement" despite the fact that Andrx had not

yet begun manufacturing the generic equivalent. *Id.* at 900; *see also Wallace v. Free Software Foundation, Inc.*, 2005 WL 3239208, at *2 (S.D. Ind. Nov. 28, 2005) (characterizing horizontal price fixing agreements as "those made by competitors or potential competitors").[2]

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[2] A potential competitor can also suffer antitrust injury under Section 2. In *American Tobacco Co. v. United States*, 328 U.S. 781 (1946), the Court affirmed a jury's finding that three large tobacco companies had formed an illegal monopoly. The Court said that parties violate Section 2 when they "combine or conspire to acquire or maintain the power to exclude competitors from any part of [trade or commerce]... provided they also have such a power that they are able, as a group, to exclude actual or *potential competition* from the field..." *Id.* at 809 (emphasis added). The Third Circuit has also held that actual as well as potential competitors can suffer antitrust injury under Section 2. *E.g., LePage's Inc. v. Minnesota Mining & Mfg. Co.*, 324 F.3d 141, 155 (3d Cir. 2003) (finding the effect of company's bundled rebates was to "foreclose portions of the market to a potential competitor" and, accordingly, was anticompetitive such that the finding of a Section 2 violation was warranted), *cert. denied*, 542 U.S. 953 (2004); *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056 1063 (3d Cir. 1978) (holding that a market definition under Section 2 "must look at all relevant sources of supply, either actual rivals or eager potential entrants to the market"), *cert. denied*, 439 U.S. 838 (1978). *See also, e.g., United States Philips Corp. v. Windmere Corp.*, 861 F.2d 695 (Fed. Cir. 1988) (reversing lower court's directed verdict and ordering new trial on Section 2 claims due to evidence that company had engaged in predatory pricing in order to eliminate potential competitors), *cert. denied*, 490 U.S. 1068 (1989); *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986) (finding corporation liable under Section 2 for refusing to lease stadium to a potential market entrant).

**B. An entity must possess the intent and ability required to compete to be a potential competitor.**

The Third Circuit did not address whether Gordon possessed the requisite intent and ability to be a potential competitor. The court merely concluded that Gordon was not a competitor until MCCSC opened. In *Terazosin Hydrochloride*, the district court found that a generic drug manufacturer became a potential competitor of the brand name manufacturer when it filed an Abbreviated New Drug Application (**ANDA**) to produce a generic version of a brand name drug. 352 F. Supp. 2d at 1314 n.34 ("the mere filing of an ANDA is sufficient evidence that generic drug companies are competitors of brand name manufacturers"); *see also United States v. Reicher*, 983 F.2d 168 (10th Cir. 1992) (defining "potential competitor" to include a company involved in a bid-rigging scheme that was incapable of actually performing the contract on which it placed the false bid); *United States v. MMR Corp.*, 907 F.2d 489 (5th Cir. 1990) (same).

By contrast, in *Transource International, Inc. v. Trinity Industries*, 725 F.2d 274 (5th Cir. 1984), the Fifth Circuit was asked to invalidate an agreement not to compete between two parties. The court refused because one of the parties had neither the capital nor the financial ability to compete and so could not be considered a potential competitor. *Id.* at 280.

Here, it would appear that Gordon had the intent and ability to be a potential competitor. Most importantly, Gordon filed a certificate of need (**CON**) petition with the Pennsylvania Department of Health in 1996. App. at 81. At the time, a CON was required for Gordon to open his ASC. The CON process, much like the ANDA process in *Terazosin Hydrochloride*, requires significant economic

commitment and a demonstration that the applicant has both the intent and the ability to operate a health care facility. Gordon also engaged in other activities that support the conclusion he was a potential competitor. Gordon spent three months actively pursuing his CON application with the Pennsylvania Department of Health. App. at 83-84. Gordon also solicited an anesthesiologist to be on staff at MCCSC. App. at 16. *See* Pet. 23-25. ASCs will typically engage in similar activities in order to enter a new market. If an ASC possesses the requisite capacity and has made positive steps similar to the ones Gordon made to open MCCSC, it should be treated as a potential competitor.

By limiting the availability of the Sherman Act's protections to actual competitors, the Third Circuit has effectively immunized antitrust conspirators and monopolists for anticompetitive activities so long as their competitor has not yet opened. It is often the potential entrant that needs the most protection. ASCs are frequently the entities most likely to enter a market in competition with an entrenched, incumbent hospital and are frequently the target of exclusionary practices by those very hospitals.

ASCs are a significant competitive counterbalance to entrenched, incumbent hospitals. The first ASC opened in 1970. Today, more than 14 million surgeries are performed each year in over 4,500 ASCs. The vast majority of ASCs are owned by physicians, who invest in ASCs to obtain greater professional autonomy and control over their work environment and over the quality of care delivered to their patients. ASCs offer improved technology, a non-institutional, friendly environment and more convenient locations, shorter wait times and lower patient coinsurance costs than their hospital competitors. U.S. Dep't of Justice & Federal Trade Comm'n, *Improving Health Care: A Dose of Competition* (July, 2004) (***Improving Health Care***

***Report***). At the same time, ASCs save insurers and government health care programs billions of dollars by obtaining lower fees and avoiding costly hospitalizations. A recent study of Medicare claims commissioned by FASA found that, on average, claims cost $320 less in an ASC compared to hospital outpatient settings, and that the procedures performed in ASCs cost the Medicare program $1.1 billion less in 2005 than if the same procedures were performed in a hospital. The FASA study also found that if procedures performed in hospital outpatient settings were instead performed in ASCs, Medicare would have saved nearly $1.6 billion more in 2005. Federated Ambulatory Surgery Association, *Medicare Payments for Procedures Performed in Ambulatory Surgery Centers Compared with Hospital Outpatient Departments* (Apr. 5, 2005), http://www.fasa.org/april5execsum.pdf. A government report from 2003 reached similar conclusions. *See* U.S. Dep't of Health and Human Services, *Payment for Procedures in Outpatient Departments & Ambulatory Surgical Centers* (Jan., 2003) (concluding that Medicare paid $1 billion more annually for procedures performed in hospital outpatient settings than it would if the same procedures were performed in ASCs). By providing a competitive alternative to hospitals, ASCs "enhance quality of care, lower prices, and improve access." *Improving Health Care Report*, Ch. 3 at 39-40.

ASCs are therefore particularly vulnerable to this decision. As a consequence of the Third Circuit's holding, incumbents will find it far easier to quash new entry and to sustain market power. Prices will increase, and quality will decrease. The Third Circuit is alone in concluding that potential competitors are not subject and entitled to Sherman Act prohibitions and protections. No other Circuit, including the Third Circuit up until this case,

refuses to extend Sherman Act prohibitions and protections to potential competitors. This Court should grant the petition for a writ of *certiorari* to make clear that an entity does not have to sell goods or services in the same relevant market to be a competitor under the Sherman Act.

## II. THE INFORMATION RESTRAINTS HAVE A SUBSTANTIAL EFFECT ON COMPETITION.

Medicine is complex and beyond the expertise of the average person. Patients depend on their physicians to identify problems, offer choices about treatments and explain the comparative risks and benefits of different treatment options. A patient's choice about health care, and therefore her behavior in the market as a consumer, is a function of the information she receives from her physician. *Improving Health Care Report,* Executive Summary at 3, 6.

The dissemination of truthful and non-deceptive information is critical to the efficient operation of health care markets. *See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Council*, 425 U.S. 748, 765 (1976) ("[T]he free flow of commercial information is indispensable."). Restraints that limit the ability of physicians to disseminate such information therefore have a significant effect on the ability of patients to choose optimal treatments for their illnesses and can cause significant market inefficiency or failure. *Improving Health Care Report,* Ch. 3 at 17. *See also F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986) ("no credible argument" that "making it more costly... [for customers] to obtain information needed for evaluating the dentists' diagnoses had... any procompetitive effect.").

In *California Dental Ass'n v. F.T.C.*, 526 U.S. 756 (1999), the Federal Trade Commission challenged a

professional association's "code of ethics" that limited members' ability to engage in truthful, non-deceptive advertising regarding price, particularly discounted fees, and the quality of dental services. The provision prohibiting advertising claims as to the quality of services, as enforced, provided that such claims are "not susceptible to measurement or verification; accordingly, such claims are likely to be false or misleading in any material respect." *California Dental Ass'n v. F.T.C.*, 128 F.3d 720, 724 (9th Cir. 1997), *rev'd*, 526 U.S. 756 (1999); *California Dental Ass'n v. F.T.C.*, 224 F.3d 942, 945 (9th Cir. 2000) (on remand). On remand from this Court, the Ninth Circuit specifically found that the information restraints were anticompetitive even though, in that case, the procompetitive benefits outweighed them. 224 F.3d at 949; *see* 128 F.3d at 729. Similarly, here, the Third Circuit should have found the information to be anticompetitive and should have required the hospital to present procompetitive justifications in order to sustain them.

By their plain language, the information restraints at issue here prohibited the comparative information sharing that patients need to make optimal health care choices. Condition 2 provides that any "complaint or concern about any other" physician at the Hospital must be made to the President of the Medical Staff or the Chairperson of the Hospital. Condition 2 does not appear to allow Gordon to voice a complaint or, more importantly, a concern, to any one else, including a patient or prospective patient. Condition 3 provides that Gordon will not "call, or otherwise attempt to communicate, with the patients of any other ophthalmologist, or other physician practicing in the Hospital," to "comment... on the physician's training, skill or competence or the procedure performed by such physician." Condition 3 continues by stating that

"[f]urthermore,..." Gordon will not comment about any other ophthalmologist as part of his "discharge instructions..." App. at 10-11. The word "[f]urthermore" signals that the preceding prohibitions on communicating are not being limited but expanded. The word "communicate" suggests more than just oral communication but any sort of communication including advertisements. These kinds of broad information restraints—unlimited by concerns regarding the truth or accuracy of the information being conveyed or the time or manner of such communications—would have a substantial effect on competition.

Both the District Court, App. at 153-156, and the Third Circuit, App. at 43-44, believe that the petitioners have construed conditions 2 and 3 of the information restraints too broadly. The Third Circuit, specifically, states that:

> Condition 3 only serves to chill Gordon's comments regarding other ophthalmologists as part of his discharge instructions or ***at any other time when dealing with patients who have been or will be treated by the Hospital***, excepting comments made "in response to a specific question or for the purpose of a referral." In light of Gordon's history, precluding him from making gratuitous statements at any time and in whatever fashion he deemed appropriate regardless of its impact or potential impact on patient health or welfare does not, standing alone, elevate Condition 3 to having anticompetitive effects. Likewise, as the District Court determined, Condition 2 only prohibited Gordon from commenting upon a particular surgical method as it relates to a particular physician, and not, as Gordon contends, from differentiating himself and his methods in surgical meetings.

App. at 43-44 (emphasis added). The court's interpretation of the information restraints appears to contradict their plain language. Even under the court's interpretation, though, the information restraints are quite broad. The Third Circuit notes that condition 3 would apply "at any other time when dealing with patients who have been or will be treated by the Hospital." The Hospital is the only hospital, and Gordon and Nancollas were the only ophthalmologists, in Mifflin and Juniata counties. Applying to all present and future patients of the Hospital, condition 3 actually affects a significant number of ophthalmic procedures.

The information restraints in this case, as written and as read by the Third Circuit, would have a substantial effect on competition. They are the same as the restraints the Ninth Circuit found anticompetitive in *California Dental Ass'n*, 224 F.3d at 949. Any restraint that in fact limits a physician's ability to communicate with his patients about his principal competitor (and the patients' most significant alternative) in a truthful and non-deceitful manner raises significant competitive issues. The information restraints will indeed "chill" the physician/patient relationship and "chill" the competitive process. *See, e.g.*, App. at 44. Physicians need to talk to their patients—to give patients the physicians' honest opinions in a full, frank and truthful manner. But, unlike the Ninth Circuit in *California Dental Ass'n*, *id.*, the Third Circuit never evaluated the procompetitive benefits of the information restraints. The Third Circuit is therefore in conflict with this Court. This Court should grant the petition for a writ of *certiorari* to make clear that information restraints that limit the ability of physicians to disseminate truthful and non-deceptive information, such as the ones in this case, do have a substantial effect on competition meriting a full

consideration by the court and requiring strong procompetitive justifications to sustain the restraints.

## CONCLUSION

This Court should grant the petition for a writ of *certiorari* to make clear that an entity does not have to sell goods or services in the same relevant market to be a competitor under the Sherman Act. This Court should also grant the petition for a writ of *certiorari* to make clear that information restraints that limit the ability of physicians to disseminate truthful and non-deceptive information, such as the ones in this case, do have a substantial effect on competition meriting a full consideration by the court and requiring strong procompetitive justifications to sustain the restraints.

For the reasons stated herein, FASA, AAO, PAO, ACOS and CMA respectfully request that the Court grant the petition for a writ of *certiorari*.

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